

[Act 1996 No 96]



New South Wales

Married Persons (Equality of Status) Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

At common law married women are not legally capable of owning property, cannot sue their husbands in tort and generally do not have a legal identity that is independent from that of their husbands. The *Married Persons (Property and Torts) Act 1901* addressed these issues.

The objects of this Bill are:

- (a) to confirm (and extend) the equality of legal status of married persons established by the *Married Persons (Property and Torts) Act 1901*, and
- (b) to repeal the *Married Persons (Property and Torts) Act 1901*.

The proposed Act differs from the *Married Persons (Property and Torts) Act 1901* in the following respects:

- (a) it includes a general statement declaring that a married person has legal capacity as if the person was not married and enjoys a separate legal personality from his or her spouse, and
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- (b) it enables spouses to sue each other in tort generally rather than confining this right as is the case under the *Married Persons (Property and Torts) Act 1901*, and
- (c) it removes certain provisions that are now dealt with by other legislation (for example, competency and compellability of spouses as witnesses which are now covered by the *Evidence Act 1995*), and
- (d) it makes specific provision for the ownership of housekeeping payments, actions against a spouse in relation to fraudulent investments and abolishes the agent of necessity rule.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 provides that notes do not form part of the proposed Act.

Part 2 Equality of status

Division 1 General rule

Clause 4 provides for equality of legal status of married persons and that a married person has a separate legal personality from his or her spouse. This does not otherwise affect the position of a minor.

Division 2 Specific examples

Clause 5 provides that spouses may sue each other in tort. This overrides section 16 and expands sections 16A and 16B of the *Married Persons (Property and Torts) Act 1901*. Sections 16A and 16B provide that husband and wife can only sue each other in tort in limited circumstances.

Clause 6 provides that a married person can take criminal or civil action against his or her spouse for the protection of his or her property as if they were not married. This follows section 16A (1) of the *Married Persons (Property and Torts) Act 1901* and removes the restrictions contained in section 16A (3) and (4).

Clause 7 provides that neither a husband nor a wife has the authority to pledge the credit of his or her spouse for the purchase of necessaries. The presumption at common law that a wife has authority to pledge her husband's credit for maintenance has been abolished in other Australian jurisdictions.

Clause 8 provides that a married person, subject to any agreement to the contrary, is not liable for any debts incurred by his or her spouse before marriage. At common law a husband assumes the debts of his wife on marriage. Clause 8 follows section 17 (1) of the *Married Persons (Property and Torts) Act 1901* in relation to debts. The common law doctrine has also been abolished in other Australian jurisdictions.

Clause 9 provides that, unless a contrary intention is shown, a husband and wife are to be treated as two separate persons when receiving a gift or other disposition of property under an instrument. At common law a disposition to a husband and wife and a third party, for example, would be distributed with half going to the third party and the remaining half going to the husband and wife as if they were one person. Proposed clause 9 follows section 26 of the *Married Persons (Property and Torts) Act 1901*.

Clause 10 provides that an instrument is void to the extent that it restricts anticipation or alienation of property by a married woman. In NSW, section 149 (1) of the *Conveyancing Act 1919* (which will be repealed by the proposed Act) provides that a court can bind a married woman's interest in property subject to a restraint on anticipation or alienation if it is to her benefit. Restraint on anticipation or alienation has been abolished in other Australian jurisdictions.

Clause 11 provides that the specific provisions in Division 2 do not affect the generality of Division 1.

Division 3 Other matters

Clause 12 provides that housekeeping payments and allowances are taken to belong to a husband and wife as joint tenants. At common law household savings are presumed to belong to a wife. The *Married Persons (Property and Torts) Act 1901* makes no provision for this.

Clause 13 provides that a married person may apply to the Supreme Court to have money belonging to the person, which has been invested by his or her spouse without the consent of the married person, transferred back in to his or her name. This updates section 22 of the *Married Persons (Property and Torts) Act 1901*.

Part 3 Miscellaneous

Clause 14 is a regulation making power.

Clause 15 repeals certain Acts to the extent specified in Schedule 1.

Clause 16 is a formal provision giving effect to the amendment of the *Supreme Court Act 1970* set out in Schedule 2.

Clause 17 is a formal provision giving effect to Schedule 3, which contains savings and transitional provisions.

Clause 18 provides for the review of the Act by the Minister 5 years after its commencement.

Schedule 1 repeals the *Married Persons (Property and Torts) Act 1901* and certain provisions of the *Conveyancing Act 1919* and the *Wills, Probate and Administration Act 1898*.

Schedule 2 makes amendments to the *Supreme Court Act 1970*.

Schedule 3 contains savings and transitional provisions consequent on the enactment of the proposed Act.